

DISSEMINATION OF INFORMATION TO THE NEWS MEDIA

Commentary

The public is entitled to know what goes on in the criminal justice system. The public gets this information through the news media. It is the prosecutor's responsibility to ensure that the public is accurately, truthfully and fully informed within the confines of the law, established principles of professional ethics, and the protection of victims and witnesses. To achieve this goal, it is vital that open lines of communication be maintained between our office and the news media, and that the prosecutor's attitude toward the news media be open, frank and cooperative.

CASES TO BE REPORTED TO THE MEDIA RELATIONS DIVISION

Cases of significant public interest are of prime concern to the news media. These cases include the following:

1. Crimes that are particularly serious, brutal or heinous, such as multiple murders, serial killings, kidnappings, and violent or bizarre crimes against the person;
2. Crimes capable of arousing widespread public interest or concern;
3. Crimes offending public sensibilities;
4. Extraordinary white collar crimes;
5. Negligent deaths or serious bodily injuries to workers;
6. Environmental crimes that may have serious consequences to the public;
7. Crimes involving any prominent person, including public officials and law enforcement officers;
8. The killing or serious injury of a law enforcement officer or firefighter while on duty;
9. The maiming or killing of any animal or serious animal attacks on humans.

Any case of significant public interest should be reported as soon as possible to the Media Relations Division. When a case of significant public interest is filed, the filing deputy must prepare a confidential memorandum (or e-mail) summarizing the case and including the ages, addresses and occupations of all accused, as well as the name and age of the victim(s), unless disclosure is precluded by law. This memorandum must be forwarded through channels to the appropriate bureau director and the Media Relations Division. The memorandum must clearly designate on the Media Relations Division copy any confidential information that should not be made public.

Deputies are expected to be available to consult with Media Relations Division personnel and cooperate with the news media. Media Relations Division is to be kept advised of important developments in cases of significant public interest investigated by the Bureau of Investigation. Details of current investigations and pending cases are not to be disclosed to the news media without the approval of the bureau director.

SUBSTANCE OF STATEMENTS TO THE NEWS MEDIA

Trial Publicity - State Bar Rule of Professional Conduct 5-120

Statements to the news media must comply with Rule 5-120 of the State Bar Rules of Professional Conduct. Should there be a conflict between a provision of the Legal Policies Manual and a mandatory provision of Rule 5-120, Rule 5-120 controls. Where the provisions of the rule are discretionary, statements must comply with the rule and with the Legal Policies Manual. Rule 5-120 reads as follows:

Rule 5-120. Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;***
- (2) the information contained in a public record;***
- (3) that an investigation of the matter is in progress;***
- (4) the scheduling or result of any step in litigation;***
- (5) a request for assistance in obtaining evidence and information necessary thereto;***
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and***
- (7) in a criminal case, in addition to subparagraphs (1) through (6):***
 - (a) the identity, residence, occupation, and family status of the accused;***
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;***
 - (c) the fact, time, and place of arrest; and***
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.***

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets.

Disclosure of Warrant Prohibited - Penal Code Section 168

Penal Code section 168 provides:

(a) Every district attorney, clerk, judge, or peace officer who, except by issuing or in executing a search warrant or warrant of arrest for a felony, willfully discloses the fact of the warrant prior to execution for the purpose of preventing the search or seizure of property or the arrest of any person shall be punished by imprisonment in the state prison or in a county jail for not exceeding one year.

(b) This section shall not prohibit the following:

(1) A disclosure made by a district attorney or the Attorney General for the sole purpose of securing voluntary compliance with the warrant.

(2) Upon the return of an indictment and the issuance of an arrest warrant, a disclosure of the existence of the indictment and arrest warrant by a district attorney or the Attorney General to assist in the apprehension of a defendant.

(3) The disclosure of an arrest warrant pursuant to paragraph (1) of subdivision (a) of Penal Code Section 14201.6.

Office Guidelines

Subject to Penal Code section 168, at the time of arrest, the issuance of an arrest warrant, the filing of a complaint or the public revelation of an indictment, the following information may be released by a deputy district attorney:

1. The accused's name, age, residence, occupation and family status;
2. Identity of the victim, if not otherwise precluded by law;
3. If the accused has not been arrested, any information necessary to aid in his/her apprehension;
4. The facts and circumstances of the arrest, including the time and place of arrest, resistance, pursuit and/or use of weapons;
5. The identity of the investigating and arresting officer or agency and the length of investigation;
6. Description of physical evidence seized;
7. Nature, substance or text of the charge, including a brief description of the offense charged;
8. Quotes from public records of the court;
9. Schedule and explanation of the judicial process;
10. Request for assistance in obtaining evidence.

The following information shall not be released:

1. The name of an accused juvenile, unless the minor is deemed a 602 ward and charged with a serious or violent felony as enumerated in Welfare & Institutions Code section 676;
2. Information regarding a confession, admission or statement given by the accused;
3. Prior criminal record;
4. Possibility of a guilty plea to the offense charged or a lesser offense;
5. Any opinion as to the accused's guilt or innocence or to the merits of the case or evidence;
6. The performance of any tests or examinations or a suspect's refusal or failure to submit to examinations or tests, unless it is a matter of public court record and there is an overriding public interest in its release which outweighs potential prejudice to the accused;
7. Identity, testimony or credibility of prospective witnesses;
8. Inflammatory statements that might prejudice an accused's right to a fair trial;
9. Statements that violate existing gag orders or statutory rules of confidentiality;
10. The existence of a grand jury, grand jury transcript or indictment without prior judicial approval;
11. The contents of a probation report.

NEWS REQUESTS FOR STATEMENTS

Media requests for statements concerning a pending case may be handled by the assigned deputy, his or her head deputy or deputy-in-charge, or referred to the Media Relations Division. The Media Relations Division should be notified of reporters' calls and the responses.

CONTACTS WITH THE NEWS MEDIA

Significant news media inquiries must be reported by telephone to the Media Relations Division, which is responsible for briefing the District Attorney, the Chief Deputy District Attorney and other appropriate management personnel.

NOTIFYING MEDIA RELATIONS DIVISION OF LOCAL STORIES OF INTEREST

Head deputies and deputies-in-charge in branch and area offices shall immediately notify the Media Relations Division of stories in local newspapers involving the District Attorney's Office (e.g. criticism of office action or policies, requests for investigations by local government agencies or citizens' groups, and cases of local interest).

REQUESTS TO INSPECT RECORDS - PUBLIC RECORDS ACT

Copies of Public Records Act Requests submitted by the news media to inspect documents contained in district attorney files shall immediately be forwarded to the Director of the Bureau of Prosecution Support Operations, who shall have the request entered into the Public Records Act Log, and to the Media Relations Division. A response to the request shall be prepared consistent with the statutory requirements of Government Code section 6250 *et seq.*, and provided to the party making the request after notification to the Bureau of Prosecution Support Operations and the Media Relations Division.

GRAND JURY MATTERS

All grand jury matters are confidential. A deputy may not comment to the news media concerning proposed or ongoing grand jury hearings without the prior approval of the Chief Deputy District Attorney and the court. Deputies who are approached by the news media regarding pending grand jury matters should refer such questions to the grand jury foreperson. This includes inquiries for confirmation of information already known by the news media. Only the grand jury foreperson or his/her designee may: (1) confirm that a particular hearing is scheduled or in progress; (2) provide specific details regarding witnesses or the subject matter of an investigation; and (3) discuss the policies and procedures of the grand jury.

When the grand jury returns an indictment, it is marked secret by the grand jury and sealed by the court. The indictment remains secret until the accused is arraigned, or the court orders the indictment unsealed. It is a criminal offense for a district attorney, clerk, judge, or peace officer to disclose the fact that an indictment has been returned and arrest warrant issued before the accused is arrested. (See Penal Code section 168.)

Within 10 days of the indictment, the court reporter must deliver a transcript of the grand jury proceedings to the court clerk. This transcript shall remain sealed and not open to the public until 10 days after its delivery to the defendant or his attorney. Thereafter the transcript shall be open to the public unless the court, on its own motion, or motion of a party, orders it to remain sealed. It is the policy of this Office that deputies shall object to such a motion unless there is a reasonable likelihood that making the transcript public may prejudice the defendant's right to a fair trial. (See Penal Code section 938.1.)

Occasionally, a press release or public statement may clarify for the public the value of the grand jury's investigatory role in the charging process. Whenever the District Attorney believes that the public should be advised of grand jury proceedings, the Chief Deputy District Attorney will contact the grand jury and request approval for release of information concerning a pending grand jury matter.

The Legal Advisor to the grand jury is responsible for providing a copy of this written policy to each deputy who files a Case Control Memorandum requesting approval to bring a case before the grand jury. (See the Grand Jury Manual for further details.)

Commentary

The grand jury is an independent body. Its criminal proceedings are sensitive in nature. The confidentiality of grand jury proceedings protects the investigatory nature of the hearings and the identities of victims, witnesses and suspects.

JUVENILE MATTERS

Generally, juvenile proceedings and case files are confidential pursuant to the provisions of Welfare and Institutions Code section 826 and 827. However, statutory changes made by the passage of Proposition 21 have modified the stringent rules of confidentiality when a minor is certified to adult court under Welfare and Institutions Code section 707(d), or retained in juvenile court but certified a 602 ward and charged with a serious or violent felony described in Welfare and Institutions Code section 676.

Under these circumstances, a deputy may disclose information regarding serious or violent felonies described in Welfare and Institutions Code section 676 if that information will be brought out in open court during a juvenile court hearing. Such disclosures are subject to Rule 5-120 of the State Bar Rules of Professional Conduct and Penal Code section 168 set forth above, and must conform to Rule 1410 of the California Rules of Court.

Pursuant to Welfare and Institutions Code section 676(e), juvenile petitions, minutes of the proceedings, orders of adjudication and dispositions may be disclosed unless the court seals the record after finding good cause to maintain confidentiality to protect the safety of the victim, witnesses or members of the public. Any questions regarding this policy should be directed to the appropriate Juvenile Division head deputy.

EXTENDED MEDIA COVERAGE

Pursuant to California Rules of Court, Rule 980, "...photographing, recording, and broadcasting of courtroom proceedings may be permitted as circumscribed in this rule if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected."

The decision whether to allow extended media coverage rests with the judge before whom the court proceedings are conducted. Counsel may object to such coverage and ask that it be refused, limited or terminated. California Rules of Court, Rule 980(e)(3) sets forth the factors to be considered by the court in making a determination whether to allow extended media coverage.

It is the policy of this office that deputies shall not object to extended media coverage consistent with the provisions of Rule 980 unless such coverage would adversely affect the presentation of the People's case. Whenever possible, the deputy should propose the use of less intrusive alternatives (e.g., fixed cameras, or a prohibition against showing witnesses' faces or disclosing the identities of witnesses) to a total ban of media coverage of court proceedings. Prior written approval from the deputy's bureau director must be obtained before a deputy may object to extended media coverage.

The memorandum requesting director approval should clearly describe the manner in which the extended media coverage would adversely impact the People's case. The Media Relations Division must be notified if a deputy receives approval to oppose extended media coverage.

GAG ORDERS

As a matter of office policy, deputies shall not make a motion for a gag order. If a motion for a gag order is made by the defense, the deputy handling the case shall oppose the motion.

REQUESTS TO SEAL COURT RECORDS

Unless confidentiality is required by law, court records are presumed to be open. All requests to seal court records must comply with California Rules of Court, Rules 243.1, 243.2, 243.3 and 243.4. Rules 243.1 and 243.2 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to both civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.

The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family

conciliation court (Family Code, section 1818(b)) and in forma pauperis applications (Cal. Rules of Court, rule 985(h)). The sealed records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication. (See *NBC Subsidiary*, 20 Cal.4th at 1208–1209, fn. 25.)

Rule 243.1

Rule 243.1 provides, in pertinent part, as follows:

The court may order that a record be filed under seal only if it expressly finds that:

1. There exists an overriding interest that overcomes the right of public access to the record;
2. The overriding interest supports sealing the record;
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
4. The proposed sealing is narrowly tailored; and
5. No less restrictive means exist to achieve the overriding interest.

An order sealing the record must:

1. specifically set forth the factual findings that support the order, and
2. direct the sealing of only those documents and pages -- or, if reasonably practicable, portions of those documents and pages -- that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

Rule 243.2

Rule 243.2 provides, in pertinent part, as follows:

1. A record must not be filed under seal without a court order.
2. The court must not permit a record to be filed under seal based solely upon the agreement or stipulation of the parties. A party requesting that a record be filed under seal must file a noticed motion for an order sealing the record. The motion must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing.
3. A sealed record must not be unsealed except upon order of the court.
4. A party or member of the public, or the court on its own motion, may move to unseal a record. Notice of the motion to unseal must be filed and served on the parties.

As a matter of Office policy, all requests to seal court records must have the prior approval of the appropriate head deputy.

“NEWSPERSON SHIELD LAW”

The newsperson shield law, codified in Article I, Section 2 of the California Constitution and Evidence Code section 1070, immunizes newsmen from being held in contempt by any judicial, legislative or administrative body, or any other body having power to issue subpoenas, for refusing to disclose:

1. the source of information obtained for communication to the public, or
2. unpublished information obtained or prepared for communication to the public.
“Unpublished information” is defined as information not disseminated to the public and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not disseminated to the public through a medium of communication.

Policy Not to Issue Subpoenas

The shield law exempts a newsmen from disclosing both the source of information obtained for news purposes, and any unpublished information obtained or prepared for news purposes even if the unpublished information was not obtained from a confidential source. It is the policy of this Office that deputies shall not use a criminal subpoena or subpoena duces tecum to obtain information protected by the shield law.

Penal Code Section 1524(g) – Search Warrant Unavailable

Penal Code section 1524(g) prohibits the issuance of a search warrant for any items protected by the shield law, i.e., items described in Section 1070 of the Evidence Code. Accordingly, a search warrant cannot be used to obtain the source of any news information, or unpublished news information in the possession of the news media.

Consent

However, if a deputy believes that items protected by the shield law are essential to the People’s case, the deputy may attempt to obtain the items by consent. Any such request must be approved by the appropriate head deputy or deputy-in-charge who shall immediately notify Media Relations Division of the request.

Newsperson as Percipient Witness

The shield law does not preclude the subpoena of a newsmen who was a percipient witness to a crime, or the subpoena of published information. Deputies intending to subpoena a newsmen for such purpose, or subpoena published information from a newsmen or news source, must first obtain head deputy approval and notify Media Relations Division prior to issuing the subpoena. (For a discussion of the scope of immunity accorded newsmen see *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 95 Cal.Rptr.2d 620; *Miller v. Superior Court* (1999) 21 Cal.4th 883, 89 Cal.Rptr.2d 834; *New York Times Co. v. Superior Court* (Sortomme) (1990) 51 Cal.3d 453, 273 Cal.Rptr. 98; *Delaney v. Superior Court* (1990) 50

Cal.3d 785, 268 Cal.Rptr. 753; *Dalitz v. Penthouse Intern., Ltd.* (1985) 168 Cal.App.3d 468, 214 Cal.Rptr. 254.)

NEWS MEDIA SEARCHES

Policy Not to Seek Search Warrants

It is the policy of this office not to seek search warrants for news media offices or the homes of news media personnel when less intrusive measures are available.

Use of Consent or Subpoena

If an item believed to be in the possession of the news media is sought by this office, and that item is not otherwise protected by the newsperson shield law, attempts should first be made to obtain the item by consent or subpoena.

Search Warrant for Items not Protected by the Newsperson Shield Law

If consent cannot be obtained, and a subpoena is unavailable, a search warrant may be considered for items that are not protected by the newsperson shield law.

Authorization Required

If a case is believed to be sufficiently unusual to justify a news media search warrant, and if the items sought do not fall within those items protected from seizure by Penal Code section 1524(g), authorization for the preparation of such a warrant must first be obtained from the Chief Deputy District Attorney by submitting a formal request in writing through chain-of-command. Media Relations Division should be notified of the request by the person requesting authorization.

If approval is granted, the matter shall be handled by the appropriate head deputy or deputy-in-charge.

Mandatory Search Warrant Language

The affidavit in support of the search warrant and the warrant itself shall (1) clearly state that the location to be searched serves a public news function and (2) identify with sufficient specificity the item or items to be seized in order to prevent a search for statutorily protected items. The affidavit in support of the search warrant shall state the reasons why both consent and the subpoena process are impractical or unavailable.

Notification to News Media

If a news media search warrant is approved, the possessor of the item(s) sought shall be contacted before the warrant is served, consistent with the demands of any emergency, and

given an opportunity to produce the item(s) voluntarily, unless it is believed that such notification would likely result in the destruction or secretion of the item(s).

If the possessor does not produce the item(s) voluntarily, he or she shall be notified of the time and place of the search and permitted to be present as long as he or she does not interfere with the lawful execution of the court order.

Consistent with the demands of each situation, the execution of the search warrant should be handled, if possible, so as not to disrupt any lawful business being conducted at the location of the search.

Commentary

When items in the possession of the news media are believed to be necessary to complete an investigation or prosecute a filed case, the least intrusive method should be employed to obtain these items. Attempts should first be made to obtain the items by lawful and voluntary consent. If consent cannot be obtained, the next least invasive method, a subpoena, should be issued. However, because a subpoena cannot be issued unless a case has been filed, or a grand jury proceeding commenced, the subpoena process may not be available. A search warrant should only be sought when consent cannot be obtained and a subpoena is unavailable.